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Federal Communications Commission  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Amendment of the Commission's ) WT Docket No. 97-81  
Rules Regarding Multiple Address )  
Systems )

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COMMENTS OF THE COALITION FOR EQUITABLE MAS LICENSING

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**COMMENTS OF THE COALITION FOR EQUITABLE MAS LICENSING**

The Coalition for Equitable MAS Licensing ("the MAS Coalition") by their attorneys and pursuant to Section 1.415 of the Commission's Rules hereby submit their comments in the above captioned proceeding. These comments focus solely on that aspect of the Notice of Proposed Rulemaking released February 27, 1997 ("NPRM"), pertaining to the licensing methodology that should be used to grant licenses in the MAS Coalition spectrum allocated to Multiple Address Systems ("MAS"). Specifically, the MAS Coalition urges rejection of the Commission's tentative decision to use competitive bidding to award those licenses that were applied for in 1992. The following is respectfully shown:

**I. Introductory Comment**

At the outset the MAS Coalition wants to put the focal issue in this proceeding into perspective: The issue before the Commission is not whether auctions are generally a superior method for administering radio licenses than lotteries. That issue has already been addressed elsewhere, by Congress and by the Commission. The issue here is whether the Commission can legitimately change the core rules governing applications filed over five years ago, when the Commission invited applications,

promised to use lotteries to award licenses, and then collected monies from members of the public who filed applications in reliance upon the Commission's rules. The MAS Coalition generally supports the use of auctions where applications were filed after July 26, 1993 -- because entities filing after that date, had notice of the licensing mechanism. But use of auctions for applications filed prior to that date would violate fundamental principles of good faith and fair dealing.

## II. Background

### a. The MAS Service

As stated in the NPRM, MAS originated as a service in the early 1980s with the Commission allocating twenty 25-kilohertz channel pairs in the 928-929 MHz and 952-953 MHz bands.<sup>1/</sup> In January and February of 1992 the Commission opened five two day filing windows for additional spectrum which it had allocated to MAS in 1989.<sup>2/</sup> The Commission warranted that if it received mutually exclusive applications for the additional licenses it would award those licenses pursuant to a spectrum lottery. There were only forty licenses available in the additional spectrum

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<sup>1/</sup> In re Amendment of the Commission's Rules Regarding Multiple Address System's Notice of Proposed Rulemaking, WT Docket No. 97-81 at 4 (1997).

<sup>2/</sup> Public Notice, DA 91-1422, 6 FCC Rcd 7242 (released Nov. 27, 1991).; In re Amendment of Parts 1, 21, 22, 74, and 94 of the Commission's Rules to Establish Service and Technical Rules for Government and non-Government Fixed Service Usage of the Frequency Bands 932-935 MHz and 941-944 MHz, GEN Docket No. 82-243, Second Report and Order, 4 FCC Rcd 2012 (1989).

blocks, however, during the 1992 filing period the Commission received approximately 50,000 applications.<sup>3/</sup>

**b. Auction Authority and Procedures**

In August of 1993 the Omnibus Budget Reconciliation Act of 1993 ("Budget Act")<sup>4/</sup> was passed adding section 309(j) to the Communications Act of 1934 ("Communications Act").<sup>5/</sup> Section 309(j) gave the Commission authority to use auctions as a method of granting certain radio licenses where there are mutually exclusive applications.<sup>6/</sup> However, when drafting the Budget Act Congress gave special consideration to any retroactive effect which the statute might have and gave the Commission express permission to use lotteries to grant licenses for applications received prior to July 26, 1993.<sup>7/</sup>

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<sup>3/</sup> In re Amendment of the Commission's Rules Regarding Multiple Address System's Notice of Proposed Rulemaking, WT Docket No. 97-81 at 6 (1997).

<sup>4/</sup> Pub. L. No. 103-66, Title VI, § 6002(a), 107 Stat. 312, 387 (1993) (Budget Act); see H.R. Conf. Rep. No. 213, 103d Cong., 1st Sess. 480-89 (1993), reprinted in 1993 U.S. Code Cong. & Admin. News 1169-78.

<sup>5/</sup> 47 U.S.C. § 309(j).

<sup>6/</sup> Id.

<sup>7/</sup> See H.R. Rep. No. 111, 103d Cong., 1st Sess. 253, 262-63 (1993), reprinted in 1993 U.S.C.C.A.N. 378, 580, 589-90.

In the Competitive Bidding Docket<sup>8/</sup> the Commission considered whether or not it should use competitive bidding as a licensing method for MAS. The Commission expressly determined that MAS was not subscriber based and therefore should not be subject to competitive bidding.<sup>9/</sup> At an undetermined time thereafter the Commission made a "preliminary examination"<sup>10/</sup> of MAS and found that approximately ninety-five percent of the applicants proposed to offer subscriber based services. Based on this finding the Commission decided to re-evaluate the licensing process for MAS midstream. Now, in the February 27, 1997 NPRM the Commission has proposed to change the MAS licensing process for pending mutually exclusive applications from lotteries to competitive bidding.

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<sup>8/</sup> See, Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rulemaking, 8 FCC Rcd 7635 (1993); Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Second Report and Order, 9 FCC Rcd 2348 (1994).

<sup>9/</sup> Second Report and Order, 9 FCC Rcd at 2354.

<sup>10/</sup> Although the Commission chose to use the phrase "preliminary examination", by its own admittance this examination took place after the Commission "examined various radio services . . ." for the specific purpose of determining "whether they should be subject to competitive bidding" and determined that MAS was not an appropriate candidate for auctions.

The MAS Coalition is wholly uncertain as to the nature of any "preliminary examination" that could support the Commission's stated findings, both because the applications were not specifically required to provide any information on this matter, and because the Transcription Service, recently advised the MAS Coalition that most of the MAS applications that were filed with the Commission were destroyed by flooding nearly two years ago, after being stored in basement facilities at the FCC's offices in Gettysburg, Pennsylvania.

The MAS Coalition now urges the Commission not to change the licensing process for MAS midstream, especially where to do so would frustrate applicants who filed a half-decade ago in reliance on the Commission's word that they would select MAS licenses by lottery, and where there is no Congressional intent for section 309(j) to have a retroactive effect on applications filed before July 26, 1993.

### **III. Discussion**

#### **a. Congress Did Not Intend for the Commission to Impose its Auction Authority Under Section 309(j) Retroactively to Applications Filed before July 26, 1993 and Therefore the Commission May Not Legally Do So**

The Budget Act added Section 309(j) to the Communications Act giving the Commission authority to use competitive bidding as a licensing tool where there are mutually exclusive applications.<sup>11/</sup> But that authority included meaningful limitations. When drafting the Budget Act Congress considered the inequitable effect that retroactive enforcement would have on pending applications. The statute and its legislative history both illustrate Congress' intent to exclude applications that were pending at the time of enactment from the breadth of the statute.<sup>12/</sup> Although retroactive enforcement was originally considered Congress specifically granted the Commission permission

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<sup>11/</sup> 47 U.S.C. § 309(j); Consolidated Omnibus Budget Reconciliation Act, Pub. L. No. 103-66.

<sup>12/</sup> See, H.R. Rep. No. 111, supra note 7.

to conduct lotteries for applications on file before July 26, 1993.<sup>13/</sup>

In deciding cases where the retroactive enforcement of legislation is at issue, the Supreme Court has repeatedly ruled that statutory grants of rulemaking authority do not grant the power to promulgate retroactive rules unless it is expressly conveyed by Congress.<sup>14/</sup> In Landgraf the Court found that where a statute would "impose new duties . . ." on prior transactions it would not govern those transactions "absent clear congressional intent favoring such a result."<sup>15/</sup> Here there is clear intent.

Imposing competitive bidding on MAS applicants who filed their applications five years ago with the expectation of participating in a spectrum lottery would clearly impose new duties on those applicants. Simply the expense of participating in a spectrum auction would so overburden some applicants as to eliminate their chances of obtaining a license entirely. The legislative history of the Budget Act and the enactment of Section 6002(e)(2) illustrates that it was not Congress' intent for Section 309(j) to be effective retroactively. The Commission has previously recognized and acted pursuant to this intent. A recent proceeding involving a choice between lotteries and auctions the Commission

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<sup>13/</sup> Budget Act Special Rule § 6002(e)(2), 107 Stat. 312, 397 (1993).

<sup>14/</sup> See , Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208 (1988); Landgraf v. USI Film Products, 114 S.Ct. 1483 (1994).

<sup>15/</sup> 114 S.Ct at 1505.

admitted that replacing lotteries with auctions would be an unlawful retroactive application of its auction authority.<sup>16/</sup> This reasoning is in line with the applicable Supreme Court decisions. Therefore, pursuant to the above-cited Supreme Court precedent and the Commission's own findings it would be unlawful for the Commission to subject MAS applicants to competitive bidding under Section 309(j).

**b. The Commission's Tentative Decision to Subject MAS Applicants to Competitive Bidding is Not Consistent with Prior Commission Decisions and to Enforce it Would be Unfair**

At least 3 Commission decisions to date have found that where applications were filed prior to July 26, 1993, under rules which would subject them to lottery, in the event of mutually exclusive applications, those applications were not subject to competitive bidding under Section 309(j).<sup>17/</sup> In these decisions the Commission found that the public interest would best be served by granting licenses under the rules which they were filed. In the Unserved Cellular Order the Commission recognized that "equity and administration cost and efficiency, justified the use of lotteries

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<sup>16/</sup> Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Memorandum Opinion and Order, 9 FCC Rcd 7387 ¶¶ 10, 17 (1994) ("Unserved Cellular Order").

<sup>17/</sup> Amendment of Parts 21 and 74 of the Commission's Rules With Regard to Filing Procedures in the Multipoint Distribution Service and in the Instructional Television Fixed Service, MM Docket No. 94-131, Report and Order, 10 FCC Rcd 9589, ¶ 92 (1995); Unserved Cellular Order, 9 FCC Rcd 7389-7390; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, PP Docket No. 93-253, Notice of Proposed Rulemaking, 8 FCC Rcd 7635, n. 150 (1993).

for those applicants who, in reliance on the Commission's existing lottery procedures, had filed applications prior to July 26th".<sup>18/</sup> The circumstances surrounding this decision were nearly identical to the current situation in the MAS proceeding. In reliance on the Commission's initial decision to use lotteries these applicants invested the time and money necessary to prepare and file applications for licenses. Now, the Commission has re-evaluated there position and the decision to use competitive bidding poses an entirely new financial and regulatory burden to the applicants and may in some instances eliminate applicants from the process altogether.

Many applicants expended substantial resources prior to the initial lotteries in reliance on the Commission's policy. In many cases applicant's business plans accounted for the administrative and start-up costs associated with the lottery process, few if any would have anticipated the initial costs associated with auctions. In addition to their filing fees, applicants also spent considerable sums for pre-lottery legal and engineering support, and obtaining financing. If the Commission chooses to switch to competitive bidding at this stage, even if the filing fees were refunded, these other reasonable expenditures would be rendered worthless.<sup>19/</sup>

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<sup>18/</sup> Unserved Cellular Order, 9 FCC Rcd ¶ 13.

<sup>19/</sup> See Bowen, 488 U.S. 220 (Scalia, J., concurring) (altering future regulation in a manner that makes worthless substantial past investment incurred in reliance upon the prior rule is an example of unreasonable retroactivity).

This type of inequity is exactly what Congress was trying to avoid when it established the July 26, 1993 cut-over date allowing for the Commission to use lotteries to grant licenses on applications filed before that date. The Commission has justified this lopsided approach to nearly identical situations by stating that lotteries would not be in the public interest because the larger number of applications present in MAS would cause "greater processing costs and a delay in service[.]"<sup>20/</sup> The MAS Coalition disagrees with the Commission's reasoning on this point. If the Commission were to switch to competitive bidding at this stage it could incur greater administrative costs than if it were to simply proceed with lotteries. If the change were made the Commission would have to refund application fees where appropriate and expend both time and man hours preparing to receive and process new applications and run an auction. These activities could also take substantially longer than proceeding with a lottery of applications which the Commission already has in its possession. Aside from the administrative costs and time constraints it certainly isn't in the public interest to unfairly burden 50,000 applicants who relied on the Commission's initial decision.

#### **IV. Conclusion**

For all of the above reasons, the MAS Coalition urges the Commission not to utilize auctions to license pending MAS applications. These applications were filed before July 26, 1993,

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<sup>20/</sup> NPRM, WT Docket No. 97-81 at 27.

and Congress clearly intended that auction authority not be applied retroactively.

Even if the Commission determines that it has the discretion to license these long-ago filed applications by auction, considerations of equity and the public interest should lead the Commission to find that lotteries are the appropriate method of licensing for these applications.

Respectfully submitted,

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